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IN THE

Supreme Court of the United States

Term, 1957.

No. 240

LEON A. BRINKLEY, SR.,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To The Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Leon A. Brinkley, Sr., by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 5, 1958.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in 254 F. 2d 598 (C. A. 3, 1958). This is the final judgment of the United States Court of Appeals for the Third Circuit where judgment was entered for Respondent affirming the judgment of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 5, 1958. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED.

Was not the action of the court below in refusing to submit to the jury petitioner's main theory of liability on the ground that the negligence of respondent's employee was only a "condition" and not a cause, an application of an "erroneous rule of law" in a Federal Employers' Liability Act case which constituted a denial of petitioner's right to trial by jury, as guaranteed by the Seventh Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISION AND THE STATUTE INVOLVED.

1. Constitution of the United States, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any

foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE.

The petitioner is a negro laborer, aged 45, employed by the Pennsylvania Railroad Company as such since 1937 (N. T. 6). Petitioner's job classification on February 14, 1954 was trucker-loader (19a).

On February 14, 1954, at or about 2:30 o'clock in the afternoon he was involved in an accident at the Respondent's Butler Street Station in Philadelphia, Pennsylvania (19a). At the time of the accident, he was a member of a crew assigned to unload freight cars (20a). There were four men in the crew (54a), Messrs. Brinkley, Kirby, Levy, and Tedeschi (54a). Summarily stated, this operation consisted of unloading freight from box cars onto chore boys for distribution to other cars or points in the station.

The vehicle used to transport the freight was known to the men as a "chore boy." In answer to petitioner's interrogatory number 26, the respondent described this vehicle as being a Mercury Electric Truck, 9' 4" long by 3' 4" wide. The platform of this Mercury Electric Truck or chore boy stands 1' 10" above the ground level. The Mercury Electric Truck or chore boy weighs 1800 pounds.

The operation of the chore boy is centered about the seat upon which the operator *must* sit in order to energize the vehicle. A properly operating seat on this type of vehicle is basically important for two reasons:

(a) The seat, when used, is in a flush position making an electrical contact, thereby activating the vehicle's source of energy.

(b) The seat, when not used, is in an up position, thus breaking the electrical contact and at the same time automatically sets the brakes on the vehicle. (27a, 67a).

At the time, the petitioner was unloading a box car located on Number 6 track at the Butler Street Station (52a). This car had just been opened and was loaded "clean across" the doorway (48a) not leaving any space inside the car (48a). The space between the box car and the platform was in excess of three feet (26a, 53a). The distance between the platform and box cars at other stations was about 12 to 14 inches (53a).

A transfer plate only 47 to 48 inches wide was provided to span this unusually large gap (52a) between the box car and platform (49a). The chore boy in question measured 40 inches across (Defendant's answer to plaintiff's interrogatory No. 26). This left Mr. Brinkley with only 3½ to 4 inches of transfer plate extending beyond each side of the chore boy on which to stand. Mr. Brinkley testified (37a):

> "With that Chore Boy, when I backed it on the plate, by placing it as near to one side as I could, that would allow me just about six inches, providing my feet were under the body of the Chore Boy."

The testimony also indicated that the crew with which Mr. Brinkley was associated had been admonished by one of the respondent's officers to hurry and "Get the hell to that car" (57a), i.e., the car involved in this accident. It was under this pressure that the work was being performed at the moment of the injury.

Mr. Kirby, the gang boss, had received instructions *not* to load the chore boy on the platform as they were wasting too much time (23a, 43a, 49a). The box car was loaded completely across the doorway. These instructions necessitated squeezing the chore boy onto the transfer plate (48a). This was done. The petitioner was ordered by Mr. Kirby, the gang boss (35a, 48a, 49a), to back the chore boy onto the transfer plate (48a). Due to the narrowness of the transfer plate, the petitioner had to place the chore boy as near to one side of the plate as possible without going off the edge (26a).

Mr. Kirby and Mr. Levy began to load the chore boy by tossing packages of various sizes onto the floor of the chore boy (27a) instead of properly piling them. *Mr. Levy, a fellow employee, admitted it was he who tossed the package which set the stage for the injuries which occurred seconds later* (46a). This is of utmost significance. That package landed in a way that prevented the seat from making the necessary electrical contact. Thus it was impossible to operate the chore boy (27a, 32a). This was the key negligent act.

Mr. Brinkley had nothing to do with placing that package under the seat (43a, 47a, 54a).

Mr. Brinkley dismounted the chore boy, edged alongside of it, with his toes under the body of the chore boy, balancing himself on the 3½ to 4-inches of standing room available (27a, 37a). He did this to try to dislodge the package from under the seat *in order to undo Levy's negligent act* (27a). Due to the weight of the package and the position in which the package had been carelessly thrown and snagged, and the narrowness of the foothold available, he lost his balance and fell backward 5 to 5½ feet down into a cinder covered pit (28a).

Mr. Kirby and Mr. Levy extricated the petitioner from the pit and placed him on the station platform (37a, 60a). The petitioner was not immediately removed to the hospital (60a) because Mr. McShane, a railroad official, decided

it was more important first to take Mr. Brinkley's statement.

As a result of the fall the petitioner sustained, inter alia, a permanent back injury which will require a spinal fusion (N. T. 202, 262).

The trial judge refused to submit the negligence of Levy in carelessly throwing the package on the chore boy, thus blocking its brake apparatus, as an element of negligence for jury determination on the ground that conceding it was negligence, it had created but a *condition* which he ruled, as a matter of law, could not have been a *cause* of the accident.

In this depleted state of the record the jury returned a verdict for the respondent. Judgment was entered for respondent railroad on July 22, 1957.

REASONS FOR GRANTING THE WRIT.

1. The "per curiam" decision below has condoned an erroneous ruling of federal law relative to causation by the Trial Court which effectively severed from petitioner's case his main theory of liability based on uncontradicted negligence in direct conflict with *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949); *Anderson v. Baltimore & O. R. Co.*, 89 F. 2d 629 (C. C. A. 2, 1937); *McCarthy v. Pennsylvania R. Co.*, 156 F. 2d 877 (C. C. A. 7, 1946); *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. C. A. 7, 1945).

2. The action of the Trial Court has circumvented the decisions of this Court which hold that even if there be a plurality of causes each shall be submitted to the jury for its determination. *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *McBride v. Toledo Terminal Railroad Company*, 354 U. S. 517, 77 S. Ct. 1398 (1957).

3. The denial by the Trial Court to the petitioner to submit his *entire* case to the jury seriously questions the continued authority and force of the rule laid down in *Rogers v. Missouri Pacific Railroad Co., supra.*

4. The "per curiam" decision below sanctions the right of the Trial Court to take from the jury the right to draw inferences from evidence on which liability could be predicated.

5. Where Petitioner has advised the Trial Court that the heart of his case was bottomed on the negligence of a fellow employee and that the other evidence went primarily to negate contributory negligence, but the Trial Court refused to submit this evidence supported theory, has not the Trial Court effectively diminished petitioner's right to a jury determination under the F. E. L. A. where the refusal was based on an erroneous ruling that the fellow employee's act was but "a condition" and not the cause. Does not this holding deny the mandate of this Court in F. E. L. A. cases? In the face of the command of this Court in *Rogers v. Missouri Pacific Railroad Co., supra*, the action of the Trial Court is clearly erroneous and should not be permitted to stand and therefore "special and important reasons for the grant of a certiorari" exist; *Rogers v. Missouri Pacific Railroad Company, supra*, 352 U. S. 510, 77 S. Ct. 451; *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949); *Ellis v. Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947).

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. . . . *Rogers v. Missouri Pacific Railroad Co., supra*, 352 U. S. 509, 77 S. Ct. 450.

ARGUMENT.

At the outset it should be noted that the sole question for consideration is whether in this F. E. L. A. case the trial court had the right to rule as a matter of law that the negligent act of a fellow employee did not contribute in whole or in part to petitioner's injuries.

We would not question the verdict of the jury if the trial judge had presented to the jury our main theory of liability which was supported by uncontradicted evidence. As a matter of fact, this was our basic theory—the theory on which the case was presented. It was the initial precipitating and provocative cause of this accident. Thus, the petitioner's main theory of liability has never been submitted to a jury. We ask only, that within our Constitutional right under the VII Amendment, that the issue of causation on our basic theory be submitted to the jury.

This case does not differ from one where the trial judge at the conclusion of plaintiff's evidence directs a verdict in favor of the defendant or thereafter upon review of the evidence grants a judgment n. o. v. To illustrate this in a rather simple fashion, one may disregard the various theories that the trial judge submitted to the jury and consider what would have been the situation had the petitioner relied solely on the one theory which was rejected by the court. That theory related to the negligent act of defendant's employee Levy, who carelessly tossed the package under the brake apparatus. Had this been the petitioner's sole theory of liability, then unquestionably, the respondent would have been entitled to a directed verdict in the light of the court's ruling.

An examination of the record shows it to be abundantly clear that the theory of causation as announced in *Rogers* and *Coray, supra*, was specifically raised, considered and refused. The trial judge positively did not submit and never intended to allow the jury to find that Levy's negligence was a cause of the accident (110a-112a).

It is fundamental that a party is entitled to a specific instruction on his theory of the case. In *Chicago & N. W. Ry. Co. v. Green*, 164 F. 2d 55 (8 Cir., 1947) the Court said (p. 61):

> "* * * It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made. 53 Am. Jur. Trial, § 626, pp. 487, 488. See also Western Union Tel. Co. v. Morris, 8 Cir. 105 F. 49, 54; Northern Central Coal Co. v. Hughes, 8 Cir., 224 F. 57, 59; Ranney v. Barlow, 112 U. S. 207, 214, 5 S. Ct. 104, 28 L. Ed. 662; Pennock v. Dialogue, 2 Pet. 1, 15, 27 U. S. 1, 15, 7 L. Ed. 327. . . ."

Henwood v. Coburn, 165 F. 2d 418, 425 (8 Cir., 1948); *Montgomery v. Virginia Stage Lines, Inc.*, 191 F. 2d 770, 772 (D. C. Cir., 1951); *Merchants Motor Freight v. Downing*, 227 F. 2d 247, 254 (8 Cir., 1955); *Hoyt v. Central Railroad*, 243 F. 2d 840, 844 (3 Cir., 1957).

Petitioner was just not given what he was entitled to receive in the charge. The jury simply was not instructed on his major and basic theory of the case. In denying the petitioner his theory, the trial judge applied an erroneous standard of causation in this F. E. L. A. case.

It was uncontradicted that a fellow employee of the petitioner, one Levy, had tossed a package onto the chore boy on which the petitioner was working (27a, 47a), thus, preventing the use of the brake on the vehicle whose operation was petitioner's responsibility. Equally uncontradicted was the fact that petitioner had nothing to do with placing the package there (43a, 47a, 54a). Again, it was equally uncontradicted that petitioner was injured while trying to dislodge that package (27a). To make the chore boy operable, petitioner *had* to disengage that package (27a). To do so, he *had* to assume a precarious position

which subjected him to the hazard of falling, a position which he would not have had to assume if Levy had not tossed the package under the seat. Certainly, the jury could have so found had they been allowed to pass upon the question. Yet, this was exactly what was withheld from them by the court's ruling. The court ruled *as a matter of law* that Levy's negligent conduct was but a *condition* in the situation and that the jury could not find it was *a cause*, in whole or in part, which produced this accident. It ignored its own recently announced holding in *Hoyt v. Central Railroad*, 243 F. 2d 840, 844 (3 Cir., 1957).

It is clear that the accident occurred when and only because the petitioner was forced to remove this package which should not have been thrown under the seat of the chore boy where it interfered with the operation of the brake.

With the evidence in this posture, the petitioner submitted the following points for charge which dealt with that clear negligence of Levy (151a, 152a):

> "18. I instruct you that your verdict would be for the plaintiff if you find that a fellow employee negligently or carelessly placed a package upon the Chore Boy which in any way, directly or indirectly, to the slightest degree, was a factor in or did contribute to the accident which produced the injuries sustained by this plaintiff. If you so find, your verdict must be for the plaintiff.
>
> "13. I instruct you that the plaintiff, Leon Brinkley, did not assume the risk in this case that a fellow employee would, if you so find, carelessly throw a package onto the Chore Boy in such manner that it would land under the seat and interfere with its safe operation. Mr. Brinkley had the right to expect that packages would be properly loaded on the Chore Boy without subjecting him to an unreasonable risk of harm."

An examination of the record also shows that the trial judge, recognizing that he was so ruling as a matter of law, unequivocally intended to protect the petitioner's position for review when he refused point number 18. At the conclusion of the discussion relating to this point, the trial judge said:

> "The Court: If you lose this case, Mr. Beasley, you can use that on Mr. Landis and make him pay you something anyway, because he has error in the record." (111a)

and petitioner's counsel also fully protected his position at the conclusion of the charge when he said:

> "Mr. Beasley: Yes, sir. Of course, that goes to the negligence of Mr. Levy, which Your Honor said previously you do not believe was a proximate cause of the accident. I think that is part of the objection to some of the points you have refused." (144a)

An extended discussion was held on these points in chambers prior to the charge and appears at (102a, 106a, 110a, 111a). In essence, the trial judge conceded that Levy was negligent, but ruled as a matter of law that such negligence was not "*the proximate cause*" of the accident. He held it was but a "condition." This ruling is clear error for it applies an erroneous rule of causation in violation of the true test under the Federal Employers' Liability Act which is, "Did the defendant's negligence cause plaintiff's injuries in whole or in part." 45 U. S. C. A. § 51.[1] We excepted to this error at the time it was made (106a).

Mr. Justice Black pinpointed petitioner's complaint when he said.

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1. We do not here argue that this erroneous rule of causation was in the charge of the Court to the jury. But we do argue that it was this erroneous rule of causation which led the trial judge to refuse to charge plaintiff's theory of negligence.

> "No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination . . ." *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444, 451 (1943).

More specifically, the trial judge held that the act of Levy was "a condition" and not "the proximate cause" (103a, 104a, 107a, 111a).[2] It is precisely this type of rea-

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2. "The Court: Just a minute. Here is the question that has bothered me. I have been thinking about your point on that quite a bit. Assuming that it was negligence on the part of employees pitching the package on to the truck—I say assuming that. I am not assuming it is, but assuming that whatever the evidence was it was. *Assuming it was negligence that simply created a condition*. (104a). (Emphasis supplied.)

"Mr. Landis: That is the point, sir, exactly. That is exactly it. (104a).

"The Court: There was a *condition* which was caused by the negligence of the loaders of the Chore Boy. But did such a *condition* require Brinkley to do something that is *the proximate cause* of the injury?" (104a). (Emphasis supplied.)

* * *

"The Court: I can see that when he had a duty imposed on him to move the package, which was his duty, I guess, if he had to operate the Chore Boy, he had to do it.

"If, in doing that, whether due to the negligence of the company in furnishing a machine or board or in furnishing a wide space or an unsafe place to work, he was injured, I think *that* is proximate cause. But to say that the *preceding* act of Levy in throwing the package up there would be *the proximate cause*, I doubt it very much." (106a). (Emphasis supplied.)

* * *

"The Court: I go back to the other thing. Frankly, I am afraid of it. *I am afraid that any negligence on the part of the fellows in the car in pitching that stuff out which created a condition which is the only condition which resulted in this accident, the package getting back under the seat, that it created a condition which had to be corrected, and in correcting that the question is was he given a safe place to work in making the correction*—I think that is dangerous." (110a, 111a). (Emphasis supplied.)

coning with respect to causation in Federal Employers' Liability Act cases that the Supreme Court of the United States rejected in *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949).

This Court first stated what the Supreme Court of Utah had done p. 523 (S. Ct. p. 277):

> "* * * The Utah Supreme Court reviewed the evidence here and held as a matter of law that the defective equipment did not proximately cause or contribute to the decedent's death. That court discussed distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability, and 'cause' in the 'philosophical sense,' deemed insufficient to impose liability. It considered the stopping of this train to have been a cause of decedent's death in the 'philosophical sense' in that the stopping created *'a condition upon which the negligence of plaintiff's intestate operated,'* one perhaps of many causes 'so insignificant that no ordinary mind would think of them as causes.' The court added, however, that the stopping 'was not the legal cause of the result,' thereby classifying it as not 'a substantial, as well as actual factor in bringing about' the decedent's death. . . ." (Emphasis supplied.)

Criticizing and reversing the Supreme Court of Utah for the use of the words "a condition", among others, this Court left no doubt of the test to be used with respect to causation in cases under this Act. The Court said, p. 524 (S. Ct. 277):

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or

in part' from defective appliances such as were here maintained. 45 U. S. C. § 51, 45 U. S. C. A. § 51."

Thus, there can be no doubt that the identical dialectical subtlety—"a condition"—which *Coray* struck down, could not be used by the trial court here to defeat the right of the petitioner to have his theory of the case submitted to the jury. Yet it was. See also *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U. S. 430, 70 S. Ct. 226 (1949); *Affolder v. New York, C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509 (1950).

So, too, in *Anderson v. Baltimore & O. R. Co.*, 89 F. 2d 629 (C. C. A. 2, 1937) a fireman who had stepped down from his engine to an adjacent track to try to loosen wet sand which he had previously noticed had blocked the sander on his engine, was fatally sideswiped by a passing engine. Rejecting the argument that the defective sander was but a *condition* and not *a* proximate cause of the accident, the Court of Appeals for the Second Circuit held for the plaintiff that the jury properly found it was *a* cause in whole or in part.

If there were doubt after the *Coray* and *Anderson* cases, *supra*, that proximate cause, as the term is restrictively used in the common law need not be present in order to have an issue of negligence presented to the jury, that doubt was resolved by the Supreme Court of the United States when it recently distinguished proximate cause as it was generally known to the common law from causation as it must be considered within the language of this statute, viz: "in whole or in part." In *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957) after criticizing the Supreme Court of Missouri for using words of proximate cause, the Supreme Court gave the correct test for causation problems in Federal Employers' Liability Act cases. This Court, per Mr. Justice Brennan, said (pp. 448, 449):

> *"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion*

that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part at all* in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* to its negligence.' (Emphasis supplied.)

"The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer *played any part, however small,* in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, *when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.*" (Emphasis supplied.)

More than a decade before the *Rogers* case *supra*, the United States Court of Appeals for the Seventh Circuit in *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. C. A. 7, 1945) swept

aside the old fashioned idea of proximate cause and gave vitality to the plain meaning of the words of the statute in these F. E. L. A. cases when it said:

> "Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence '*in part*' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation'—if the injury or death resulted '*in part*' from defendants' negligence, there is liability.
>
> "The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. *For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident.*"— (Emphasis supplied.)

Drawing upon the authority of the *Rogers* case, *supra*, and earlier cases which have adjudicated the problem, the Third Circuit recently had occasion to interpret the effect of the statutory provision of "in whole or in part" on the common law doctrine of proximate cause. It specifically

held that employer's negligence need not be *the*, or indeed even *a*, substantial factor in producing injury to be actionable under the F. E. L. A. In *Hoyt v. Central Railroad* 243 F. 2d 840 (3 Cir., 1957), Judge Kalodner, said, at pages 842-843:

> "Under the Act proof of negligence on the part of the defendant railroad is, as in the common law, a prerequisite to liability. However, the common law concept of proximate cause has been adopted to a lesser extent. At common law *the* proximate cause of the accident was *the* efficient cause or a substantial factor in producing the injury. Cf. Restatement, Torts, secs. 431, 433 (1934). Since the Act provides that liability is incurred for injuries resulting 'in part' from the defendant's negligence, liability exists where there are a plurality of causes including the negligence act of the defendant. See Eglsaer v. Scandrett, 7 Cir., 1945, 151 F. 2d 562 . . . Thus the situation must be viewed in light of the several factors which may have combined to cause the accident, and if any negligence on the part of the defendant is found among these factors, it would be liable for the resultant injuries. 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. Rogers v. Missouri Pacific Railroad Co., supra, 352 U. S. at page 506, 77 S. Ct. at page 448. Any instructions to the jury on the element of proximate causation must necessarily define liability to include a greater area than that at common law.' " (Emphasis supplied.)

Despite their holding in *Hoyt*, *supra*, the Third Circuit brushed this appeal aside with a non-analytical Per Curiam opinion, where the trial judge too had written no opinion, though it had specifically relied on the authoritativeness of

Eglsaer v. Scandrett, supra in *Ilott v. Central Railroad* as quoted *supra*. Petitioner therefore has never had a true review of this question.

In *Webb v. Illinois Central Railroad Co.*, 352 U. S. 512, 77 S. Ct. 451 (1957) the plaintiff, a brakeman, injured his knee when he slipped on a clinker "about the size of his fist" embedded in the road bed. The defendant contended that the proofs did not raise a jury question of defendant's negligence in causing or permitting the clinker to be there. This Court held that the evidence was sufficient to show such negligence. The Court then said (p. 515, S. Ct. 454):

> "Although we do not think that the case presents an issue of causation, if the quoted language of the Court of Appeals is read as holding that a jury finding could not reasonably be made that respondent's negligence 'in whole or in part' caused the petitioner's injury, then what we said in Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443, 448, is pertinent."

Again, in *Thomson v. Texas & Pacific Railway Company*, 353 U. S. 926, 77 S. Ct. 698 (1957) this Court reversed the Court of Appeals for the Fifth Circuit when it entered a judgment for the defendant after a jury verdict for the plaintiff. In that F. E. L. A. case a female employee was injured while unloading sacks of mail. The only testimony to support her one allegation that she had asked for help and had been refused, was her testimony on cross-examination that "I had been instructed not to ask, I couldn't have anyone work the mail with me, there wasn't any need to ask." *Texas & Pacific Railway Company v. Thomson*, 232 F. 2d 313 (5 Cir., 1956), footnote 5, p. 316. Reversing "per curiam" this Court announced again:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 77 S. Ct. 443;

Webb v. Illinois Central R. Co., 352 U. S. 512, 77 S. Ct. 451; Ferguson v. Moore-McCormack Lines, 352 U. S. 521, 77 S. Ct. 457."

In *H. T. Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U. S. 360, 77 S. Ct. 840 (1957) this Court reversed the Court of Civil Appeals of Texas when they entered judgment for the defendant in an F. E. L. A. case where the plaintiff was struck by a truck backing into a passageway. This Court held that the jury's general verdict should be upheld despite the fact that the jury also answered interrogatories as follows, p. 362 (S. Ct. 841, 842, Footnote 2):

> "(1) There was no negligence in failing to warn the petitioner of the truck; (2) there was no negligence in allowing the truck to be driven onto the passageway while the petitioner was working there; (3) there was no negligent failure on the part of the respondent to keep a proper lookout; (4) there was no negligent failure on the part of the truck driver to keep a proper lookout; (5) there was no negligence in failing to give a warning before backing up the truck; (6) there was no negligence in backing the truck into the passageway; (7) the truck did not back too close to the tracks, did not back up too fast, and was not negligently driven without adequate visibility; (8) petitioner did not move into the path of the truck 'when such movement could not be made with safety'; and (9) petitioner failed to keep a proper lookout for the truck, and this failure was a cause of the accident, though not the sole cause."

This Court said, p. 360 (S. Ct. 840):

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. [citing cases.] The jury's general verdict that the respondent

negligently contributed to the petitioner's injury, has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties."

This Court in *Rinehiser v. Chesapeake & Ohio Railway Company*, 354 U. S. 901, 77 S. Ct. 1093 (1957) again reversed a judgment n. o. v. in an F. E. L. A. case involving a question of causation.

In that case the plaintiff, an engineer, while sitting in his engine had an urgent call of nature. A long train of empties was passing between him and the toilet so he went to a lowsided gondola car which he thought was empty. He climbed into it and while he was there some steel plates in the car shifted, injuring his leg. The trial judge entered judgment n. o. v. and the Sixth Circuit affirmed on the ground that it was not foreseeable that a person would use a car for such purpose. This judgment was reversed in a short Per Curiam opinion by this Court.

The recent F. E. L. A. case of *McBride v. Toledo Terminal Railroad Company*, 354 U. S. 517, 77 S. Ct. 1398 (1957) again demonstrates the true test of causation in these cases. There the plaintiff was descending a ladder when the accident occurred. The jury found the defendant negligent only in providing insufficient lighting. Plaintiff testified that when he was descending the ladder he was not looking down and his foot slipped. The Supreme Court of Ohio had said, at 140 N. E. 2d 319 (1957):

> "It is inconceivable that the absence of sufficient artificial lighting would even be a factor causing his foot to slip."

This Court reversed the Supreme Court of Ohio when that court held as a matter of law that the petitioner did not establish sufficient proof of causation.

Certainly, when this Court has held that the question of causation was for the jury on the facts in the *McBride*

case, *supra*, no court may refuse in this case to permit the jury to find that Levy's carelessness played a "*part*" in the accident when in fact it was the primary, most provocative act leading to the accident and one without the commission of which, this accident would never have occurred. Yet, the trial judge here refused to do precisely that.

To paraphrase Justice Douglas in *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354, 63 S. Ct. 1062, 1064 (1943), withdrawing the negligent act of Levy from the jury is to usurp its function.

In *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545 (1945), the feeling of this Court was succinctly stated by Justice Black and has significant application to the instant case. It there said,

> "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.' *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354, 63 S. Ct., 1062, 1064, 87 L. Ed. 1444." and further (p. 604):
>
> ". . . *The negligence of the employer may be determined by viewing its conduct as a whole.* Union Pacific Railroad Co. v. Hadley, 246 U. S. 330, 332, 333, 38 S. Ct. 318, 319, 62 L. Ed. 751. *And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.*" (Emphasis supplied.)

This Court has been vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of a just and full determination of their rights. This has been especially so in the F. E. L. A. cases where the sole opportunity for redress for the injured worker rests on a jury determination.

Clearly, the trial court's action in excluding Levy's negligent act from the jury's determination has not only defeated the intention of Congress in cases of this type, but has an erosive effect on this Court's holdings that the Act is not to be narrowly and niggardly construed. *Rogers v. Missouri Pacific Railroad Co., supra*, 352 U. S. 509, 77 S. Ct. 450.

CONCLUSION.

It is respectfully submitted that in ruling, as a matter of law, the fellow employee's conduct was but a condition and could not be considered as a causative factor in producing this accident, the trial court ignored completely all the great body of law in this field on that very subject.

Since there has never been a trial by jury on the main issue in this case, it is respectfully submitted that a new trial be granted.

Respectfully submitted,

B. NATHANIEL RICHTER,
JAMES E. BEASLEY,
Counsel for Petitioner.

Of Counsel:

RICHTER, LORD & LEVY.

APPENDIX.

ORDER OF THE U. S. DISTRICT COURT.

WHAM, *J.*

Having considered the points raised by Plaintiff's Motion for a New Trial filed on July 26, 1957 as amplified by Plaintiff's Amplified Motion for a New Trial filed on July 30, 1957, in light of plaintiff's principal brief in support of said motion, defendant's brief in opposition thereto and plaintiff's brief in reply to defendant's brief, I have reached the conclusion that plaintiff's said motion for new trial is without merit and must be denied.

Wherefore, the motion is denied and the Clerk will note such denial on the record of the case.

FRED L. WHAM,
United States District Judge.

October 4, 1957
Centralia, Illnois

OPINION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed May 5, 1958)

PER CURIAM.

Plaintiff-appellant in this Federal Employers' Liability action urges that the refusal of two of his requests to charge was error.

Under the facts and law the requests as stated were properly denied.

Our examination of the charge satisfies us that the true issues in the case were fully, carefully and fairly given the jury by the trial judge.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT.

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA G. CRESKOFF,
Clerk.

May 5, 1958